

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

<i>In the Matter of</i>	)	
	)	
Petition of	)	
Costco Wholesale Corporation	)	CG Docket No. 02-278
	)	CG Docket No. 05-338
	)	

**COMMENT OF ABC BUSINESS FORMS, INC. AND THE BACKER LAW FIRM, LLC  
IN OPPOSITION TO PETITION OF COSTCO WHOLESALE CORPORATION  
FOR RETROACTIVE WAIVER OR DECLARATORY RULING**

The petition for retroactive waiver filed by Costco Wholesale Corporation (“Costco”) is abusive and should be denied.

As Costco explains in its Petition, two lawsuits have been filed against it for sending unsolicited advertisements via fax. *See, ABC Business Forms, Inc. v. Costco Wholesale Corporation*, No. 1:15-cv-03870 (May 15, 2015 N.D. Ill.) attached as Ex. A; and *Backer Law Firm, LLC. v. Costco Wholesale Corporation*, No. 4:15-cv-00327-SRB (April 2, 2015 W.D. Mo.), attached as Ex. B. In those lawsuits, Plaintiffs allege that they received faxes from Costco despite the fact that they had no prior relationship with it and had not authorized the sending of fax advertisements. (*Id.*) The faxes attached to the complaints indicate that no opt-out notice was provided. (*Id.*)

Costco nonetheless asserts that its marketers *may* provide faxes to customers who have requested them and that the “normal practice” is to contact prospective customers via telephone and obtain express consent before sending any information, including information that will be transmitted via facsimile....such faxes are sent with prior express invitation or permission, they

were “solicited.” (Petition, pp. 2-5).

The waiver contemplated by the FCC does not extend to faxes sent in the context of an established business relationship (i.e. the customers Costco asserts have requested faxes). Rather, because the Commission’s notice of intent to adopt Section 64.1200(a)(4)(iv) “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent *with prior express invitation or permission of the recipient*,” such retroactive waivers should only be considered in those instances involving prior express invitation or permission where there is some evidence that the petitioner misunderstood and, as the FCC provided, **not** in instances involving established business relationships or “customers.”

With respect to any others, Costco failed to supply any basis for its assertions that it obtained “prior express permission” from anyone, including plaintiffs. In fact, contrary to Costco’s unsupported assertions, *each* of the plaintiffs in *two* separately filed class action lawsuits have asserted that they have received faxes from Costco and have never been telephoned nor provided such consent. *See, ABC Business Forms, Inc. v. Costco Wholesale Corporation*, Ex. A; and *Backer Law Firm, LLC v. Costco Wholesale Corporation*, Ex. B.

The Commission has repeatedly held that the business claiming consent or an established business relationship has the burden of proof. “[A] sender should have the obligation to demonstrate that it complied with the rules, including that it had the recipient’s prior express invitation or permission.” *In re: Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278; CG Docket No. 05-338, FCC Release 06-42, 21 FCC Rcd 3787, at 3812, 2006 FCC LEXIS 1713; 38 Comm. Reg. (P & F) 167 (April 6, 2006). The FCC has consistently adhered to this position. *Virtual Auto Loans*, EB-09-TC-230, 2009

FCC LEXIS 4342 (March 9, 2009); *New York Security and Private Patrol, Inc.*, EB-09-TC-231, 2009 FCC LEXIS 4343 (March 9, 2009).

Courts have also followed this rule and placed the burden of proof on the sender of the communication. *Gutierrez v. Barclays Group*, 10cv1012 DMS (BGS), 2011 U.S. Dist. LEXIS 12546, 2011 WL 579238, at \*2 (S.D. Cal. Feb. 9, 2011); *Van Sweden Jewelers, Inc. v. 101 VT, Inc.*, 1:10-cv-253, 2012 WL 4074620, 2012 U.S. Dist. LEXIS 85663 (W.D.Mich., June 21, 2012); *Green v. Service Master on Location Servs. Corp.*, 07 C 4705, 2009 WL 1810769, 2009 U.S. Dist. LEXIS 53297 (N.D. Ill. June 22, 2009); *Sadowski v. Med1 Online, LLC*, 07 C 2973, 2008 WL 2224892, \* 3-4, 2008 U.S. Dist. LEXIS 41766 (N.D. Ill. May 27, 2008) (observing that issue of consent is an affirmative defense); *Hinman v. M & M Rental Ctr., Inc.*, 596 F. Supp. 2d 1152 (N.D. Ill. 2009) (finding that consent did not exist with respect to the class because the TCPA allocates the burden of obtaining consent on the senders of unsolicited faxes, rather than requiring recipients to "opt-out"); *Lampkin v. GGH, Inc.*, 2006 OK CIV APP 131, 146 P.3d 847, ¶27 (Okla. Ct. App. 2006) (recipient should not be charged with proving the negative propositions that it did not give permission or did not have a business relationship with sender). This is consistent with the general rule that the party claiming the benefit of an exception in a federal statute, and the party who logically would have evidence of consent or an established business relationship, has the burden of coming forward with at least some evidence of the applicability of these exceptions. *E.E.O.C. v. Chicago Club*, 86 F.3d 1423, 1429-30 (7th Cir. 1996); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 128 S. Ct. 2395, 2400, 171 L. Ed. 2d 283 (2008) ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally

rests on one who claims its benefits."); *Irwin v. Mascott*, 96 F. Supp. 2d 968 (N.D. Cal. 1999).

Here, Costco offers absolutely nothing to substantiate (a) who was actual sender(s) or (b) that anyone consented to receiving faxes from it. There is also no evidence that Costco or anyone else that sent the fax misunderstood anything about its obligation to include an opt-out notice. The faxes at issue are not specifically addressed to any person, which would normally be the case if consent to send it had been obtained, and the opt-out notices was omitted in all instances, making the statement that they were confused appear to be disingenuous, at best. They have made no distinction in the opt-out notice utilized for those advertisements sent pursuant to an "established business relationship"; those sent with that it deems "provided prior express invitation;" or others.

On this record, no action by the Commission is warranted. The petition is nothing more than a baseless attempt to complicate enforcement actions by the recipient of the faxes.

Respectfully submitted,

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# EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

ABC BUSINESS FORMS, INC.,	)	
on behalf of plaintiff and	)	
the class members defined herein,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
COSTCO WHOLESALE CORPORATION	)	
and JOHN DOES 1-10	)	
	)	
Defendants.	)	

**COMPLAINT – CLASS ACTION**

**MATTERS COMMON TO MULTIPLE COUNTS**

**INTRODUCTION**

1. Plaintiff ABC Business Forms, Inc., brings this action to secure redress for the actions of defendant Costco Wholesale Corporation, in sending or causing the sending of unsolicited advertisements to telephone facsimile machines in violation of the Telephone Consumer Protection Act, 47 U.S.C. §227 (“TCPA”), the Illinois Consumer Fraud Act, 815 ILCS 505/2 (“ICFA”), and the common law.

2. The TCPA expressly prohibits unsolicited fax advertising. Unsolicited fax advertising damages the recipients. The recipient is deprived of its paper and ink or toner and the use of its fax machine. The recipient also wastes valuable time it would have spent on something else. Unsolicited faxes prevent fax machines from receiving and sending authorized faxes, cause wear and tear on fax machines, and require labor to attempt to identify the source and purpose of

the unsolicited faxes.

### **PARTIES**

3. Plaintiff ABC Business Forms, Inc. is an Illinois corporation with offices at 5654 North Elston Avenue, Chicago, Illinois 60646, where it maintains telephone facsimile equipment.

4. Costco Wholesale Corporation is a Washington corporation. Its registered agent and office are John Sullivan, 999 Lake Drive, Issaquah, Washington 98027.

5. Defendants John Does 1-10 are other natural or artificial persons that were involved in the sending of the facsimile advertisements described below. Plaintiff does not know who they are.

### **JURISDICTION AND VENUE**

6. This Court has jurisdiction under 28 U.S.C. §§1331 and 1367. *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 751-53 (2012); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7<sup>th</sup> Cir. 2005).

7. Personal jurisdiction exists under 735 ILCS 5/2-209, in that defendant:

- a. Has committed tortious acts in Illinois by causing the transmission of unlawful communications into the state.
- b. Has transacted business in Illinois.

8. Venue in this District is proper for the same reason.

### **FACTS**

9. In April 2015, plaintiff ABC Business Forms, Inc. received the unsolicited fax advertisement attached as Exhibit A on its facsimile machine.



10. Discovery may reveal the transmission of additional faxes as well.

11. Defendant Costco Wholesale Corporation is responsible for sending or causing the sending of the fax.

12. Defendant Costco Wholesale Corporation, as the entity whose products or services were advertised in the fax, derived economic benefit from the sending of the fax.

13. Defendant Costco Wholesale Corporation either negligently or wilfully violated the rights of plaintiff and other recipients in sending the fax.

14. Plaintiff had no prior relationship with defendant and had not authorized the sending of fax advertisements to plaintiff.

15. The fax did not contain an opt-out notice that complied with 47 U.S.C. §227.

16. On information and belief, the fax attached hereto was sent as part of a mass broadcasting of faxes.

17. On information and belief, defendant has transmitted similar unsolicited fax advertisements to at least 40 other persons in Illinois.

18. There is no reasonable means for plaintiff or other recipients of defendant's unsolicited advertising faxes to avoid receiving illegal faxes. Fax machines must be left on and ready to receive the urgent communications authorized by their owners.

**COUNT I – TCPA**

19. Plaintiff incorporates ¶¶ 1-18.

20. The TCPA makes unlawful the “use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine ...” 47 U.S.C. §227(b)(1)(C).

21. The TCPA, 47 U.S.C. §227(b)(3), provides:

**Private right of action.**

**A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—**

**(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,**

**(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or**

**(C) both such actions.**

**If the Court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the subparagraph (B) of this paragraph.**

22. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes, in the form of paper and ink or toner consumed as a result. Furthermore, plaintiff's statutory right of privacy was invaded.

23. Plaintiff and each class member is entitled to statutory damages.
24. Defendant violated the TCPA even if its actions were only negligent.
25. Defendant should be enjoined from committing similar violations in the future.

**CLASS ALLEGATIONS**

26. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons (b) who, on or after a date four years prior to the filing of this action (28 U.S.C. §1658), (c) were sent faxes by or on behalf of defendant Costco Wholesale Corporation, promoting its goods or services for sale (d) and which did not contain an opt out

notice as described in 47 U.S.C. §227.

27. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

28. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. The manner in which defendant compiled or obtained its list of fax numbers;
- c. Whether defendant thereby violated the TCPA;
- d. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- e. Whether defendant thereby converted the property of plaintiff.
- f. Whether defendant thereby created a private nuisance.
- g. Whether defendant thereby committed a trespass to chattels.

29. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

30. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

31. A class action is the superior method for the fair and efficient adjudication of this

controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

32. Several courts have certified class actions under the TCPA. *Holtzman v. Turza*, 08 C 2014, 2009 U.S. Dist. LEXIS 95620 (N.D.Ill., Oct. 14, 2009), *aff'd* in relevant part, 728 F.3d 682 (7<sup>th</sup> Cir. 2013); *Sadowski v. Med1 Online, LLC*, 07 C 2973, 2008 U.S. Dist. LEXIS 41766 (N.D.Ill., May 27, 2008); *CE Design Ltd. v Cy's Crabhouse North, Inc.*, 259 F.R.D. 135 (N.D.Ill. 2009); *Targin Sign Sys. v Preferred Chiropractic Ctr., Ltd.*, 679 F. Supp. 2d 894 (N.D.Ill. 2010); *Garrett v. Ragle Dental Lab, Inc.*, 10 C 1315, 2010 U.S. Dist. LEXIS 108339, 2010 WL 4074379 (N.D.Ill., Oct. 12, 2010); *Hinman v. M & M Rental Ctr.*, 545 F.Supp. 2d 802 (N.D.Ill. 2008); *Clearbrook v. Rooflifters, LLC*, 08 C 3276, 2010 U.S. Dist. LEXIS 72902 (N.D. Ill. July 20, 2010) (Cox, M.J.); *G.M. Sign, Inc. v. Group C Communs., Inc.*, 08 C 4521, 2010 U.S. Dist. LEXIS 17843 (N.D. Ill. Feb. 25, 2010); *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642 (W.D.Wash. 2007); *Display South, Inc. v. Express Computer Supply, Inc.*, 961 So.2d 451, 455 (La. App. 1<sup>st</sup> Cir. 2007); *Display South, Inc. v. Graphics House Sports Promotions, Inc.*, 992 So. 2d 510 (La. App. 1<sup>st</sup> Cir. 2008); *Lampkin v. GGH, Inc.*, 146 P.3d 847 (Ok. App. 2006); *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. (App.) 94, 50 P.3d 844 (2002); *Core Funding Group, LLC v. Young*, 792 N.E.2d 547 (Ind.App. 2003); *Critchfield Physical Therapy v. Taranto Group, Inc.*, 293 Kan. 285; 263 P.3d 767 (2011); *Karen S. Little, L.L.C. v. Drury Inns, Inc.*, 306 S.W.3d 577 (Mo. App. 2010).

33. Management of this class action is likely to present significantly fewer difficulties that those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Actual damages;
- b. Statutory damages;
- c. An injunction against the further transmission of unsolicited fax advertising;
- d. Costs of suit;
- e. Such other or further relief as the Court deems just and proper.

**COUNT II – ILLINOIS CONSUMER FRAUD ACT**

34. Plaintiff incorporates ¶¶ 1-18.

35. Defendant engaged in unfair acts and practices, in violation of ICFA § 2, 815 ILCS 505/2, by sending unsolicited fax advertising to plaintiff and others.

36. Unsolicited fax advertising is contrary to the TCPA and also Illinois law. 720 ILCS 5/26-3(b) makes it a petty offense to transmit unsolicited fax advertisements to Illinois residents.

37. Defendant engaged in an unfair practice by engaging in conduct that is contrary to public policy, unscrupulous, and caused injury to recipients of their advertising.

38. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes, in the form of paper and ink or toner consumed as a result.

39. Defendant engaged in such conduct in the course of trade and commerce.

40. Defendant's conduct caused recipients of their advertising to bear the cost thereof.

This gave defendant an unfair competitive advantage over businesses that advertise lawfully, such



as by direct mail. For example, an advertising campaign targeting one million recipients would cost \$500,000 if sent by U.S. mail but only \$20,000 if done by fax broadcasting. The reason is that instead of spending \$480,000 on printing and mailing his ad, the fax broadcaster misappropriates the recipients' paper and ink. "Receiving a junk fax is like getting junk mail with the postage due". Remarks of Cong. Edward Markey, 135 Cong Rec E 2549, Tuesday, July 18, 1989, 101st Cong. 1st Sess.

41. Defendant's shifting of advertising costs to plaintiff and the class members in this manner makes such practice unfair. In addition, defendant's conduct was contrary to public policy, as established by the TCPA and Illinois statutory and common law.

42. Defendant should be enjoined from committing similar violations in the future.

#### **CLASS ALLEGATIONS**

43. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons and entities with Illinois fax numbers (b) who, on or after a date three years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant, Costco Wholesale Corporation, promoting its goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

44. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

45. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax

advertisements;

- b. Whether defendant thereby violated the TCPA;
- c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.
- f. Whether defendant thereby committed a trespass to chattels.

46. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

47. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

48. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of a class, consisting of (a) all persons and entities with Illinois fax numbers (b) who, on or after a date three years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant Costco Wholesale Corporation, promoting its goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

49. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

50. There are questions of law and fact common to the class that predominate over

any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendant thereby violated the TCPA;
- c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.
- f. Whether defendant thereby committed a trespass to chattels.

51. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

52. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

53. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

54. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.



WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unsolicited fax advertising;
- c. Attorney's fees, litigation expenses and costs of suit;
- d. Such other or further relief as the Court deems just and proper.

**COUNT III – CONVERSION**

55. Plaintiff incorporates ¶¶ 1-18.

56. By sending plaintiff and the class members unsolicited faxes, defendant converted to its own use ink or toner and paper belonging to plaintiff and the class members.

57. Immediately prior to the sending of the unsolicited faxes, plaintiff and the class members owned and had an unqualified and immediate right to the possession of the paper and ink or toner used to print the faxes.

58. By sending the unsolicited faxes, defendant appropriated to its own use the paper and ink or toner used to print the faxes and used them in such manner as to make them unusable. Such appropriation was wrongful and without authorization.

59. Defendant knew or should have known that such appropriation of the paper and ink or toner was wrongful and without authorization.

60. Plaintiff and the class members were deprived of the paper and ink or toner, which could no longer be used for any other purpose. Plaintiff and each class member thereby suffered damages as a result of receipt of the unsolicited faxes.

61. Defendant should be enjoined from committing similar violations in the future.

**CLASS ALLEGATIONS**

62. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons with Illinois fax numbers (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant Costco Wholesale Corporation, promoting its goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

63. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

64. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendant thereby violated the TCPA;
- c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.
- f. Whether defendant thereby committed a trespass to chattels.

65. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not

to vigorously pursue this action.

66. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

67. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

68. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unsolicited fax advertising;
- c. Costs of suit;
- d. Such other or further relief as the Court deems just and proper.

### **COUNT III – PRIVATE NUISANCE**

69. Plaintiff incorporates ¶¶ 1-18.

70. Defendant's sending plaintiff and the class members unsolicited faxes was an unreasonable invasion of the property of plaintiff and the class members and constitutes a private nuisance.

71. Congress determined, in enacting the TCPA, that the prohibited conduct was a

“nuisance.” *Universal Underwriters Ins. Co. v. Lou Fusz Automotive Network, Inc.*, 401 F.3d 876, 882 (8<sup>th</sup> Cir. 2005).

72. Defendant acted either intentionally or negligently in creating the nuisance.

73. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes.

74. Defendant should be enjoined from continuing its nuisance.

#### **CLASS ALLEGATIONS**

75. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons with Illinois fax numbers, (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant Costco Wholesale Corporation, promoting its goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

76. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

77. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendant thereby violated the TCPA;
- c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.

- e. Whether defendant thereby created a private nuisance.
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78. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

79. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

80. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

81. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unsolicited fax advertising;
- c. Costs of suit;
- d. Such other or further relief as the Court deems just and proper.

**COUNT IV – TRESPASS TO CHATTELS**



82. Plaintiff incorporates ¶¶ 1-18.

83. Plaintiff and the class members were entitled to possession of the equipment they used to receive faxes.

84. Defendant's sending plaintiff and the class members unsolicited faxes interfered with their use of the receiving equipment and constitutes a trespass to such equipment. *Chair King v. Houston Cellular*, 95cv1066, 1995 WL 1693093 at \*2 (S.D. Tex. Nov. 7, 1995) (denying a motion to dismiss with respect to plaintiff's trespass to chattels claim for unsolicited faxes), vacated on jurisdictional grounds 131 F.3d 507 (5th Cir. 1997).

85. Defendant acted either intentionally or negligently in engaging in such conduct.

86. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes.

87. Defendant should be enjoined from continuing trespasses.

#### **CLASS ALLEGATIONS**

88. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons with Illinois fax numbers (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant Costco Wholesale Corporation, promoting its goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.

89. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

90. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

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- d. Such other or further relief as the Court deems just and proper.

/s/ Daniel A. Edelman  
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(312) 419-0379 (FAX)



**NOTICE OF LIEN AND ASSIGNMENT**

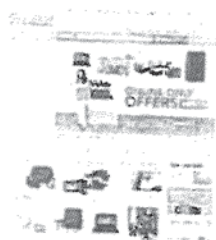
Please be advised that we claim a lien upon any recovery herein for 1/3 or such amount as a court awards. All rights relating to attorney's fees have been assigned to counsel.

/s/ Daniel A. Edelman  
Daniel A. Edelman

Daniel A. Edelman  
EDELMAN, COMBS, LATTURNER  
& GOODWIN, LLC  
20 S. Clark Street, Suite 1500  
Chicago, Illinois 60603  
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# **EXHIBIT A**

# JOIN COSTCO!



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Offer Expires: **05/30/2015**



MBR0000490 0114

VALUE | QUALITY | SAVINGS | WOW!

# EXHIBIT B

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
AT INDEPENDENCE**

THE BACKER LAW FIRM, LLC, on behalf of	)	
itself and all those similarly situated,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.:
	)	
COSTCO WHOLESALE CORPORATION,	)	
<u>Serve:</u> CT Corporation System	)	
120 South Central Avenue	)	
Clayton, MO 63105	)	
	)	
Defendant.	)	

**PETITION FOR DAMAGES  
(CLASS ACTION)**

**COMES NOW** Plaintiff The Backer Law Firm, LLC ("Plaintiff"), on behalf of itself and all those similarly situated, and for its causes of action against Defendant Costco Wholesale Corporation ("Defendant"), states, alleges, and avers to the Court as follows:

**Venue and Jurisdiction**

1. This action arises out of an incident that occurred on or about December 17, 2012 in Jackson County, Missouri.
2. Pursuant to RSMo. § 506.500, jurisdiction is proper in this Court because Defendant transacted business in Jackson County, Missouri and/or committed tortious acts in Jackson County, Missouri.
3. Pursuant to RSMo. § 508.010, venue is proper in this Court because the transaction, some part of the transaction, and tortious acts arose and took place within Jackson County, Missouri, and/or Plaintiff was first injured Jackson County, Missouri.



4. Further, jurisdiction and venue are proper pursuant to 47 U.S.C. § 227(b)(3), which grants state courts jurisdiction over actions alleging violations of 47 U.S.C § 227.

#### **The Parties**

5. Plaintiff is a Missouri limited liability corporation, maintaining its office at 14801 East 42<sup>nd</sup> Street South, Suite 100, Independence, Jackson County, Missouri 64055.

6. Defendant is and was a corporation formed in the State of Washington maintaining a principal place of business in the State of Washington.

7. At all times pertinent hereto, Defendant was and is registered or authorized to do business in the State of Missouri and Defendant may be served at its registered agent in the State of Missouri, CT Corporation System, 120 South Central Avenue, Clayton, Missouri 63105.

#### **General Allegations**

8. On or about December 17, 2012, and thereafter, Plaintiff maintained telephone service at Plaintiff's business location in Jackson County, Missouri, which was connected to a telephone facsimile machine.

9. On or about December 17, 2012, Defendant transmitted or caused to be transmitted to Plaintiff's telephone facsimile machine an unsolicited fax advertisement, an example of which is attached hereto as "**Exhibit A.**"

#### **Class Action Allegations**

10. Upon information and belief, Defendant transmitted or caused to be transmitted unsolicited fax advertisements to numerous persons in addition to Plaintiff.

11. Plaintiff brings this action on its own behalf and on behalf of a class of all

persons similarly situated pursuant to Rule 52.08. The Plaintiff Class consists of all persons to whom Defendant transmitted a facsimile promoting Defendant's products or services between April 10, 2011 and April 10, 2015.

12. The Plaintiff Class satisfies all of the prerequisites stated in Rule 52.08(a):

- (a) The class is so numerous that joinder of all members would be impractical. Upon information and belief, members of the class number in the hundreds or thousands.
- (b) There are questions of law or fact common to the class, such as whether or not Defendant committed the acts complained of and if the actions of Defendant violated the TCPA or constituted conversion, violation of the Missouri Computer Tampering Act, negligence, or negligence per se.
- (c) The claims of the representative plaintiff are typical of the claims of the Plaintiff Class.
- (d) The representative plaintiff and its counsel will fairly and adequately protect the interests of the class. Representative plaintiff and its counsel have no interests antagonistic to the class. The representative plaintiff and its counsel will prosecute the action vigorously on behalf of the class. Plaintiff is represented by counsel with experience in litigation of tort and telecommunication class action cases.

13. The Plaintiff Class also satisfies the requirements of Rule 52.08(b):

- (a) The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications

with respect to individual members of the class, which would establish incompatible standards of conduct for the party opposing the class.

- (b) The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

14. Further, the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for the party opposing the class.

15. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and the class action is superior to other available methods for the fair and efficient adjudication of the controversy, in that:

- (a) It is believed that Defendant's computer and business records will enable Plaintiff to readily identify class members and establish liability and damages;
- (b) Liability and damages can be established for Plaintiff and the class with the same common proofs;
- (c) Statutory damages are provided for in the TCPA and are the same for all class members and can be calculated in the same or similar manner;
- (d) A class action will result in an orderly and expeditious



administration of claims, and it will foster economies of time, effort and expense;

- (e) A class action will contribute to uniformity of decisions concerning Defendant's practices;
- (f) As a practical matter, the claims of the class are likely to go unaddressed absent class certification.

**Count I:**  
**Violation of the**  
**Telephone Consumer Protection Act**

16. Plaintiff incorporates by reference Paragraphs 1 through 15 as though fully set forth herein.

17. In pertinent part, the TCPA, 47 U.S.C. § 227(b)(1)(C) provides that:

It shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement . . . .

18. "Unsolicited advertisement" is defined by 47 U.S.C. § 227(a)(5) as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without the person's prior express invitation or permission, in writing or otherwise."

19. The TCPA provides for a private right of action as stated in 47 U.S.C § 227(b):

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

20. On or about December 17, 2012, Defendant violated the TCPA by using or causing to be used a telephone facsimile machine, computer, or other device to send an unsolicited facsimile advertisement to Plaintiff's telephone facsimile machine.

**WHEREFORE**, Plaintiff prays that this Court:

- (a) Enter an order pursuant to Rule 52.08(c) that this action is to be maintained as a class action and appoint and denominate the undersigned as class counsel;
- (b) Enter judgment for Plaintiff and Plaintiff Class against Defendant awarding damages of \$500.00 to \$1,500.00 for each violation of the TCPA;
- (c) Enter a Preliminary and Permanent Injunction prohibiting Defendant from transmitting unlawful facsimile advertisements; and
- (d) Any relief the Court deems just and proper under the circumstances.

**Count II:**  
**Conversion**

21. Plaintiff incorporates by reference Paragraphs 1 through 20 as though fully set forth herein.

22. On or about December 17, 2012, and thereafter, Plaintiff possessed an unqualified and immediate ownership interest and right to possession and use of its facsimile machine, telephone line, toner, paper, and memory.

23. Plaintiff never authorized Defendant to use Plaintiff's facsimile machine, telephone line, toner, paper, or memory for any purpose.

24. Without authorization, on or about December 17, 2012, Defendant assumed or exercised the right of ownership and possession over Plaintiff's facsimile machine, telephone line, toner, paper, and memory by using or causing to be used a telephone facsimile machine, computer, or other device to send an unsolicited facsimile advertisement to Plaintiff's telephone facsimile machine.

25. During Defendant's exercise of unauthorized ownership and possession over Plaintiff's facsimile machine, telephone line, toner, paper, and memory, Plaintiff was excluded from exercising its ownership and possession rights over its facsimile machine, telephone line, toner, paper, and memory.

26. As a direct and proximate result of Defendant's conversion of Plaintiff's facsimile machine, telephone line, toner, paper, and memory, Plaintiff was aggrieved and denied its ownership rights and has suffered an actual and ascertainable loss and interest thereon, including, but not limited to the loss of use of Plaintiff's facsimile

machine, telephone line, toner, paper, and memory and the permanent loss of Plaintiff's toner and paper.

**WHEREFORE**, Plaintiff prays that this Court:

- (a) Enter an order pursuant to Rule 52.08(c) that this action is to be maintained as a class action and appoint and denominate the undersigned as class counsel;
- (b) Enter judgment for Plaintiff and Plaintiff Class against Defendant awarding damages, interest, and costs of suit;
- (c) Enter a Preliminary and Permanent Injunction prohibiting Defendant from transmitting unlawful facsimile advertisements; and
- (d) Any relief the Court deems just and proper under the circumstances.

**Count III:**  
**Violation of the**  
**Missouri Computer Tampering Act**

27. Plaintiff incorporates by reference Paragraphs 1 through 26 as though fully set forth herein.

28. In pertinent part, the Missouri Computer Tampering Act, RSMo. § 569.097 ("MCTA"), provides:

A person commits the crime of tampering with computer equipment if he knowingly and without authorization or without reasonable grounds to believe that he has such authorization:

(1) Modifies, destroys, damages, or takes equipment or data storage devices used or intended to be used in a computer, computer system, or computer network; or



(2) Modifies, destroys, damages, or takes any computer, computer system, or computer network.

29. In pertinent part, the MCTA, provides:

A person commits the crime of tampering with computer users if he knowingly and without authorization or without reasonable grounds to believe that he has such authorization:

(1) Accesses or causes to be accessed any computer, computer system, or computer network; or

(2) Denies or causes the denial of computer system services to an authorized user of such computer system services, which, in whole or in part, is owned by, under contract to, or operated for, or on behalf of, or in conjunction with another.

30. Plaintiff's telephone facsimile machine is one or more of the following, pursuant to RSMo. § 556.063:

- (a) A "computer" because it is "the box that houses the central processing unit (cpu), along with any internal storage devices, such as internal hard drives, and internal communication devices, such as internal modems capable of sending or receiving electronic mail or fax cards, along with any other hardware stored or housed internally . . .";
- (b) "Computer equipment" because it is "computers, terminals, data storage devices, and all other computer hardware associated with a computer system or network";
- (c) "Computer hardware" because it is "all equipment which can collect, analyze, create, display, convert, store, conceal or transmit electronic, magnetic, optical or similar computer impulses or data . . ."; or
- (d) A "computer system" because it is "a set of related, connected or unconnected, computer equipment, data, or software."

31. Defendant's unsolicited facsimile transmission to Plaintiff's telephone facsimile machine is tampering because, as defined by RSMo. § 569.010, "to tamper" means "to interfere with something improperly, to meddle with it, displace it, make unwarranted alterations in its existing condition, or to deprive, temporarily, the owner or possessor of that thing."

32. The MCTA provides for a private right of action, as provided in RSMo. § 537.535:

1. In addition to any other civil remedy available, the owner or lessee of the computer system, computer network, computer program, computer service or data may bring a civil action against any person who violates sections 569.095 to 569.099, RSMo, for compensatory damages, including any expenditures reasonably and necessarily incurred by the owner or lessee to verify that a computer system, computer network, computer program, computer service, or data was not altered, damaged, or deleted by the access.
2. In any action brought pursuant to this section, the court may award reasonable attorney's fees to a prevailing plaintiff.

33. Defendant violated RSMo. § 569.097 on or about December 17, 2012 by tampering with and modifying, destroying, or damaging the telephone line, internal storage device, paper, and toner of Plaintiff's telephone facsimile machine without Plaintiff's authorization.

34. Defendant violated RSMo. § 569.099 on or about December 17, 2012 by tampering with and accessing, causing to be accessed, denying service, or causing service to be denied to Plaintiff's telephone line and telephone facsimile machine without Plaintiff's authorization.

35. As a result of Defendant's violation of the MCTA, Plaintiff is entitled to attorney's fees and compensatory damages, including expenditures to verify Plaintiff's telephone facsimile machine was not altered, damaged, or otherwise affected by Defendant's unauthorized access and tampering.

**WHEREFORE**, Plaintiff prays that this Court:

- (a) Enter an order pursuant to Rule 52.08(c) that this action is to be maintained as a class action and appoint and denominate the undersigned as class counsel;
- (b) Enter judgment for Plaintiff and Plaintiff Class against Defendant awarding damages, reasonable attorney's fees, and costs of suit;
- (c) Enter a Preliminary and Permanent Injunction prohibiting Defendant from transmitting unlawful facsimile advertisements; and
- (d) Any relief the Court deems just and proper under the circumstances.

**Count IV:**  
**Negligence**

36. Plaintiff incorporates by reference Paragraphs 1 through 35 as though fully set forth herein.

37. As the operators or controllers of a telephone facsimile machine, computer, or other device used to send telephone facsimile communications, Defendant owed a duty of reasonable care to conduct its facsimile marketing campaign in a reasonable manner so as not to cause unauthorized use and consumption of the facsimile machine, telephone line, toner, paper, and memory of Plaintiff.

38. This duty of reasonable care included the duty to refrain from sending a facsimile advertisement to Plaintiff unless: (1) Plaintiff had expressly consented to receiving facsimile advertisements from Defendant and Defendant included the specific opt-out language on the face of each facsimile advertisement as required by 47 U.S.C. § 227(b)(1)(C)(i), (ii), and (iii); or (2) Defendant had a documented established business relationship with Plaintiff and Defendant included the specific opt-out language on the face of each facsimile advertisement as required by 47 U.S.C. § 227(b)(1)(C)(i), (ii), and (iii).

39. In the exercise of reasonable care, Defendant knew or should have known that Plaintiff had not expressly consented to receiving facsimile advertisements from Defendant and Defendant's facsimile advertisement did not include the specific opt-out language on the face of each facsimile advertisement as required by 47 U.S.C. § 227(b)(1)(C)(i), (ii), and (iii).

40. In the exercise of reasonable care, Defendant knew or should have known that Defendant did not have a documented established business relationship with Plaintiff and Defendant's facsimile advertisement did not include the specific opt-out language on the face of each facsimile advertisement as required by 47 U.S.C. § 227(b)(1)(C)(i), (ii), and (iii).

41. Defendant acted negligently and breached this duty of reasonable care on or about December 17, 2012 by using or causing to be used a telephone facsimile machine, computer, or other device to send an unsolicited facsimile advertisement to Plaintiff's telephone facsimile machine, causing unauthorized use and consumption of Plaintiff's facsimile machine, telephone line, toner, paper, and memory.



42. As a direct and proximate result of Defendant's negligence, Plaintiff was aggrieved and has suffered an actual and ascertainable loss, including, but not limited to, the loss of use of Plaintiff's facsimile machine, telephone line, toner, paper, and memory and the permanent loss of Plaintiff's toner and paper.

**WHEREFORE**, Plaintiff prays that this Court:

- (a) Enter an order pursuant to Rule 52.08(c) that this action is to be maintained as a class action and appoint and denominate the undersigned as class counsel;
- (b) Enter judgment for Plaintiff and Plaintiff Class against Defendant awarding damages and costs of suit;
- (c) Enter a Preliminary and Permanent Injunction prohibiting Defendant from transmitting unlawful facsimile advertisements; and
- (d) Any relief the Court deems just and proper under the circumstances.

**Count V:**  
**Negligence Per Se**

43. Plaintiff incorporates by reference Paragraphs 1 through 42 as though fully set forth herein.

44. On or about December 17, 2012, the TCPA and the MCTA applied to Defendant.

45. On or about December 17, 2012, Defendant violated the TCPA by using or causing to be used a telephone facsimile machine, computer, or other device to send an unsolicited facsimile advertisement to Plaintiff's telephone facsimile machine.

46. On or about December 17, 2012, Defendant violated the MTCA by tampering with and modifying, destroying, or damaging the telephone line, internal storage device, paper, and toner of Plaintiff's telephone facsimile machine without Plaintiff's authorization.

47. On or about December 17, 2012, Defendant violated the MCTA by tampering with and accessing, causing to be accessed, denying service, or causing service to be denied to Plaintiff's telephone line and telephone facsimile machine without Plaintiff's authorization.

48. Plaintiff was in the class of persons the TCPA and the MCTA is designed to protect.

49. As a direct and proximate result of Defendant's violation of the TCPA and the MCTA, Plaintiff was aggrieved and has suffered an actual and ascertainable loss, including, but not limited to, the loss of use of Plaintiff's facsimile machine, telephone line, toner, paper, and memory and the permanent loss of Plaintiff's toner and paper.

50. The losses suffered by Plaintiff are of the type the TCPA and the MCTA are designed to protect.

51. The TCPA and the MCTA provide for a private right of action.

**WHEREFORE**, Plaintiff prays that this Court:

- (a) Enter an order pursuant to Rule 23(c)(1) that this action is to be maintained as a class action and appoint and denominate the undersigned as class counsel;
- (b) Enter judgment for Plaintiff and Plaintiff Class against Defendant awarding damages and costs of suit;
- (c) Enter a Preliminary and Permanent Injunction prohibiting

Defendants from transmitting unsolicited facsimile advertisements;  
and

- (d) Any relief the Court deems just and proper under the  
circumstances.

**Demand For Trial By Jury**

52. Plaintiff hereby demands a trial by jury on all issues so triable.

Respectfully submitted,

WOOD LAW FIRM, LLC

By /s/ Ari N. Rodopoulos

Noah K. Wood MO #51249

Ari N. Rodopoulos MO #58777

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Kansas City, MO 64105-5171

T: (816) 256-3582

F: (816) 337-4243

Attorneys for Plaintiff



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## EXCLUSIVE OFFER AT THIS EVENT:



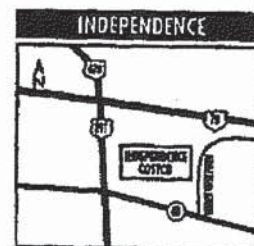
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